No. 14-915

In The Supreme Court of the United States

REBECCA FRIEDRICHS, et al.,

Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE MACKINAC CENTER FOR PUBLIC POLICY IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Mackinac Center for Public Policy is a Michigan-based, nonprofit, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1988.

Michigan recently became a right-to-work state, and it is currently severing the link between exclusive representation and mandatory agency fees in both the public and private sector. The Mackinac Center has played a prominent role in studying and litigating issues related to mandatory unionism.

SUMMARY OF ARGUMENT

This Court upheld the constitutionality of agency fees for public-sector workers in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). If *Abood* were overturned, public employees would not have to pay agency fees to a union that represented them.

This freedom to not pay would be equivalent to that provided by a right-to-work law. The experience

[1] This brief is filed with the written consent of all parties. No counsel for a party authored the brief in whole or in part, nor did any person or entity, other than amicus curiae, its members, or its counsel, make a monetary contribution to the preparation or submission of this brief.

of unions operating in a right-to-work environment therefore provides guidance about the future of unions if *Abood* is overruled.

The *Abood* holding was questioned in *Harris v. Quinn*, 134 S.Ct. 2618 (2014). The majority asked whether there is an inextricable link between the state interest in preserving a viable exclusive bargaining agent for public-sector workers and permitting unions to charge agency fees to non-union members. *Harris* was decided on other grounds, but the *Harris* dissenters argued that without agency fees, workers would refuse to pay their union for its bargaining services, and that this endemic "free-riding" would eventually undermine the union's effectiveness and the state's interest in exclusive bargaining.

At the certiorari stage, amicus curiae tested this theory by using data from the Bureau of Labor Statistics' Current Population Survey (CPS) to calculate union membership rates among workers covered by a collective bargaining agreement.[2] It was shown employing the last 15 years of data – i.e., data recorded from 2000 to 2014 – that the union membership rate among workers covered by a collective bargaining agreement was 93% in "agency-fee" states and 84% in right-to-work states. These percentages

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[2] This membership rate is simply the number of union members covered by a collective bargaining agreement divided by the number of workers – both union members and nonmembers – covered by a collective bargaining agreement.

stayed relatively constant over time, showing no signs of the endemic free-riding that would weaken unions as exclusive bargaining agents.

The instant brief builds on that research foundation. It looks at the experiences of Wisconsin and Michigan, both of which have recently passed public-sector right-to-work laws, among other changes to their collective bargaining regime for state and local government employees. While the events in these states have generated significant attention, neither provides enough data to determine the impact of right-to-work on union viability. In fact, some high-ranking Michigan union officials appear to reject the *Harris* dissenters' theory that unions cannot survive in a right-to-work environment.

The instant brief utilizes customized cuts of the CPS data set to analyze the experience of public-sector unions and state and local government employees in the eight U.S. states that maintain a broad and stable scope of mandatory bargaining subjects for public-sector employees, impose a duty of fair representation on unions, and guarantee a right to work. The resulting union membership rates for state and local government employees covered by a union contact – percentages in the mid- to high 70s from 2000 to 2007, and in the low 80s from 2008 to 2014 – largely mirrored those of the private sector in right-to-work states. These relatively high and stable union membership rates do not suggest public-sector unions would be unable to serve as viable exclusive bargaining partners if *Abood* were overruled.

The premise of *Abood* – that exclusive bargaining cannot exist without agency fees – is demonstrably wrong, and *Abood* should be overruled.

ARGUMENT

There is not an inextricable link between exclusive representation and an agency fee. This can be shown by empirical evidence. Hence *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), was wrongly decided, and the decision should be overturned.

A. Introduction

This Court is considering Petitioners' question of "whether *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), should be overruled and public-sector 'agency shop' arrangements invalidated under the First Amendment." If this Court overruled *Abood*, it would effectively create a "right-to-work" environment for all public-sector employees represented by a union. The effect of such a decision, then, can be anticipated by looking at the impact of right-to-work policies on private- and public-sector union participation.

Amicus curiae's certiorari-stage brief addressed the issue of whether an agency shop – i.e., an agency-fee

requirement[3] – is necessary to the state's interest in maintaining exclusive representation in the public sector. The brief reviewed federal Bureau of Labor Statistics data about private-sector union membership and union contract coverage from the bureau's Current Population Survey (CPS).[4] This national data showed there is not an inextricable link between exclusive bargaining and an agency shop.

The instant brief uses amicus curiae's prior brief as a foundation to explore further data – specifically, figures from Michigan, Wisconsin, and those states that have public-sector right-to-work policies and mandatory exclusive bargaining statutes for significant numbers of state and local government employees. The findings for the public sector are in line with those of the private-sector analysis in the previous brief. Even when public-sector workers are free from agency fees, a substantial and stable percentage of them elect to become union members when they are covered by a collective bargaining agreement (CBA).

In other words, unions can and do succeed as exclusive bargaining agents in the public sector in the absence of agency fees. The state interest in allowing

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[3] This requirement is occasionally referred to as a "fair-share agreement."

[4] The brief also examined the Michigan Education Association's experience after Michigan passed a right-to-work law. These events, which are discussed below, likewise indicate that the state's interest in exclusive bargaining does not warrant an agency fee.

an exclusive representative in collective bargaining for government workers does not justify the significant impingement of their First Amendment rights through the imposition of agency fees.

B. This Court's case law on the relationship between agency fees and exclusive bargaining in the public sector

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court held it was constitutional for public-sector unions to charge non-union members a mandatory fee to defray the costs of contract negotiation and grievance administration related to a collective bargaining agreement that controlled the terms and conditions of the nonmembers' employment.

The *Abood* holding began to be reexamined in *Knox v. Service Employees*, 132 S.Ct. 2277 (2012). This Court stated that agency fees "constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'" *Id.* at 2289 (citation to internal quotation omitted). It was noted that free-rider arguments are "generally insufficient to overcome First Amendment objections." *Id.* This Court explained that acceptance of the concept of "labor peace" to justify "compelling nonmembers to pay a portion of union dues" was an "anomaly." *Id.* at 2290.

In *Harris v. Quinn*, 134 S.Ct. 2618 (2014), this Court considered whether *Abood* should be extended to allow the imposition of agency fees on personal

care providers who were considered less than "full-fledged state employees." *Id.* at 2638. The holding discussed *Abood*'s shortcomings at length.

One such shortcoming was a failure to recognize that discussions of wages and benefits "are important political issues" in the public sector, but "generally not so in the private sector." *Id.* at 2632.[5] The impact of collective bargaining between government and its workers can have profound political effects and inevitably constitute political speech.

A second shortcoming – and the one principally addressed in this brief – was the contention that exclusive representation requires agency fees: "[A] critical pillar of the *Abood* Court's analysis rests on an unsupported empirical assumption, namely, that the principle of exclusive representation is dependent

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[5] At the certiorari stage, amicus curiae's brief showed that state and local governments spent about $1.3 trillion annually on compensation in both 2012 and 2013 (see footnote 2 of that brief). Total state and local government spending for 2012 was around $3.1 trillion. Dividing the wages by the total spending shows that around 42% of state and local government spending is on wages and benefits. The percentage and the raw numbers show that such spending is a significant public concern.

That same footnote discussed Michigan's $25.8 billion unfunded pension liability for the Michigan Public School Employees' Retirement System, which covers nearly 200,000 retirees and 200,000 current employees of Michigan's conventional public schools and community colleges. Collective bargaining decisions over the wages of public school employees directly affect the size of that retirement system's pension liabilities.

on a union or agency shop." *Harris*, 134 S.Ct. at 2634. This Court explained:

> A union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked. For example, employees in some federal agencies may choose a union to serve as the exclusive bargaining agent for the unit, but no employee is required to join the union or to pay any union fee. Under federal law, in agencies in which unionization is permitted, "[e]ach employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right." 5 U.S.C. § 7102 (emphasis added).[22]

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[22] A similar statute adopts the same rule specifically as to the U.S. Postal Service. See 39 U.S.C. § 1209(c).

Harris, 134 S.Ct. at 2640.

The *Harris* dissenters recognized that the majority's logic imperiled *Abood* "as to all public employees." *Id.* at 2651 (Kagan, J., dissenting). The *Harris* dissenters attempted to defend the link between exclusive representation and agency fees. While recognizing that free-riding arguments usually fail, it was noted there is "an essential distinction between unions and

special-interest organizations generally." *Id.* at 2656. This point was elaborated upon:

> The law compels unions to represent – and represent fairly – every worker in a bargaining unit, regardless [of] whether they join or contribute to the union. That creates a collective action problem of far greater magnitude than in the typical interest group, because the union cannot give any special advantages to its own backers. *In such a circumstance, not just those who oppose but those who favor a union have an economic incentive to withhold dues; only altruism or loyalty – as against financial self-interest – can explain their support.* Hence arises the legal rule countenancing fair-share agreements: *It ensures that a union will receive adequate funding, notwithstanding its legally imposed disability – and so that a government wishing to bargain with an exclusive representative will have a viable counterpart.*

Id. at 2656 (emphasis added). The dissenters then questioned whether the personal care providers union would survive without agency fees and pointed to federal unions to show that high levels of support are not guaranteed:

> Still, the majority too quickly says, it has no worries in this case: Given that Illinois's caregivers voted to unionize, "it may be presumed that a high percentage of [them] became union members and are willingly paying union dues." But in fact nothing of the sort may be so presumed, given that

> union supporters (no less than union detractors) have an economic incentive to free ride. See supra, at 2656-2657. The federal workforce, on which the majority relies, see ante, at 2640, provides a case in point. There many fewer employees pay dues than have voted for a union to represent them.[7] And why, after all, should that endemic free-riding be surprising? *Does the majority think that public employees are immune from basic principles of economics? If not, the majority can have no basis for thinking that absent a fair-share clause, a union can attract sufficient dues to adequately support its functions.*
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>
> [7] See, e.g., R. Kearney & P. Mareschal, Labor Relations in the Public Sector 26 (5th ed. 2014) ("[T]he largest federal union, the American Federation of Government Employees (AFGE), represented approximately 650,000 bargaining unit members in 2012, but less than half of them were dues-paying members. All told, out of the approximately 1.9 million full-time federal wage system (blue-collar) and General Schedule (white-collar) employees who are represented by a collective bargaining contract, only one-third actually belong to the union and pay dues").

Id. at 2657 (emphasis added). Thus, the dissenters defended public-sector agency fees as the only way a union could remain a viable exclusive representative in collective bargaining with the government.

C. National numbers related to private-sector union membership

At the certiorari stage, amicus curiae tested the *Harris* dissenter's economic theory by examining the Bureau of Labor Statistics' Current Population Survey.[6]

The CPS is "a monthly sample survey of about 60,000 households that obtains information on employment and unemployment among the nation's civilian noninstitutional population age 16 and over."[7] It also asks whether the responder is a union member and/or covered by a collective bargaining agreement.[8]

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[6] The BLS material was discussed at pages 20-25 of amicus curiae's brief in favor of certiorari.

[7] http://www.bls.gov/news.release/union2.nr0.htm.

[8] Part B Chapter 5.C of the CPS Interviewing Manual discusses that portion of the interview concerning "Union Membership and Coverage Concepts":

> [Y]ou ask about labor union or employee association membership on the person's sole or main job. Select "yes" for these questions if the person is a member of a labor union or an association that serves as a collective bargaining representative for the person.
>
> You will ask persons who are not members of a union or employee association whether or not (s)he is covered by a union or employee association contract at their sole or main job. Covered means: there is a contract between their employer and a union or association that affects the wages, working conditions, and/or benefits at the job.

https://www.census.gov/prod/techdoc/cps/CPS_Manual_June2013.pdf.

Using a unionstats.com cross-tabulation analysis of the CPS, amicus curiae looked at private-sector data from all 50 states over a 14-year period, 2000 to 2014. Private-sector numbers were chosen partly because they were easily accessible and involved a bargaining environment with both exclusive representation and a duty of fair representation – elements the *Harris* dissenters believed justified an agency fee. Private-sector data were also chosen because the state-by-state CPS data for private-sector employees allowed the impact of agency-fee requirements on union membership rates to be isolated by comparing states that require private-sector agency fees with those that do not. In contrast, a reliable analysis for public-sector workers was difficult given limitations in the reported CPS values and the wide variations in states' public-sector bargaining laws.[9]

Using the CPS data for private-sector employees, then, amicus curiae separated the 50 states into three

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[9] Public-sector unions vary widely in their control over representation, with some, such as those in Michigan, having a power of exclusive representation, and others, such as those in Arizona, having only the power to meet and confer with public employers on behalf of members who have voluntarily joined.

Moreover, the reported CPS figures do not distinguish between the data for federal workers, on the one hand, and state and local government workers on the other. Since the collective bargaining regime for federal workers is not determined by state law, the presence of those workers in the data made it difficult to isolate the effect of a state-mandated public-sector agency fee.

categories: (1) states that lacked right-to-work laws during the entire 14-year period ("agency-fee states"); (2) states that had right-to-work laws during the entire 14-year period; and (3) Michigan, Indiana, and Oklahoma – "mixed-status" states that adopted a right-to-work law sometime during the 14-year period.[10] To calculate the union membership rate in each set of states in a given year, the number of union members in those states was divided by the number of workers covered by a union contract.

Over the 14-year period, the average percentage of union-represented private-sector employees who were full union members was 93% in agency-fee states, 94% in mixed-status states, and 84% in right-to-work states. Appendix, Table B.[11] Table B shows these numbers were relatively flat during those 14 years.

Amicus curiae also provided a separate chart that displays the number of private-sector union

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[10] The legal changes in the mixed-status states were effected by 2012 Mich. Pub. Act 348; 2012 Mich. Pub. Act 349; 2012 Ind. Legis. Serv. P.L. 2-2012; and Okla. Const. art. XXIII, § 1A (passed September 2001). The Mackinac Center's compiled statistics for the three groups of states can be found at the following link: http://www.mackinac.org/21020. At that time, Wisconsin had not enacted private-sector right-to-work.

[11] For the sake of clarity, amicus curiae has kept the names of the first three tables in the appendix of this brief the same as they were in amicus curiae's brief at the certiorari stage. This decision, coupled with changes to the order of the arguments in this brief, means that Table B is referenced before Table A in the text.

members and private-sector workers covered by a union contract in right-to-work states from 2000 to 2014. This chart shows that private-sector membership ebbed and flowed a little during the period, but that overall, the figures remained steady.

The persistent magnitude of these union-related worker populations, coupled with a relatively stable rate of more than 80% union membership among union-represented workers, renders untenable the *Harris* dissenters' hypothesis about the basic economic principles that operate in the absence of agency fees. Unions are in fact able to fulfill the duty of fair representation despite whatever incentive workers might face to "free ride" on the union by not paying agency fees. A financially destructive membership exodus is not inevitable after all.

D. Analysis of public-sector data from the Current Population Survey

As noted above, the data presented by amicus curiae during certiorari involved private-sector workers. This private-sector data allowed a test of the *Harris* dissenters' hypothesis concerning exclusive representation and agency fees. A similar analysis using CPS data for public-sector workers appeared impracticable.

Since the certiorari filing, however, amicus curiae has been able to run the raw CPS data for public-sector workers through the statistical analysis program Stata. The program allows very specific subsets

to be extracted from the entire CPS data set, and it has enabled amicus curiae to remove federal employees from the CPS figures and isolate state and local government employees' union membership and union contract coverage data.[12]

The discussion of the public-sector findings below begins with two states – Wisconsin and Michigan – that have generated a lot of press because of recent changes to their collective bargaining laws. The discussion then turns to a group of states that from 2000 to 2014 required exclusive bargaining, right-to-work, and a duty of fair representation in the public sector. It will be seen that the public-sector union membership figures in these states are comparable to those for states with similar longstanding requirements in the private sector. These numbers provide more evidence that public-sector unions will be – and in aforementioned states, have been – able to perform their function of exclusive representation and fair representation without agency fees.

1. Wisconsin

On June 29, 2011, Wisconsin passed Act 10, which significantly altered public-sector bargaining in that state. Included in that legislation were provisions

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[12] These figures were compiled by James Sherk, research fellow in labor economics at the Heritage Foundation.

that sharply limited the subjects of bargaining. Wis. Stat. § 111.70(4)(mb); Wis. Stat. § 111.91(1)(a). Also, the legislation required that every union annually be certified by at least 51% of those in the bargaining unit (as opposed to just a majority of those voting). Wis. Stat. § 111.70(4)(d)3.b; Wis. Stat. § 111.83(3)(b). It further had a right-to-work for public-sector employees.[13] Wis. Stat. § 111.70(2); Wis. Stat. § 111.82.

There were numerous signs of Act 10's impact. Consider the Wisconsin Education Association Council ("WEAC"), the state's largest teachers' union. In 2012, there was a report the union had lost 29% of its membership since Act 10.[14] By early 2014, WEAC had reportedly lost "about a third of [the] approximately 98,000 members" it had when Act 10 became law.[15] By February 2015, the union's membership decline was "more than half."[16] A search on unionreports.gov. for Wisconsin unions between 10,000 and 100,000 members

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[13] On March 9, 2015, Wisconsin enacted private-sector right-to-work. http://docs.legis.wisconsin.gov/2015/related/acts/1.

[14] http://host.madison.com/news/local/education/local_schools/teachers-unions-weac-aft-wisconsin-consider-merger/article_8d73e2d8-22f1-11e2-8710-0019bb2963f4.html.

[15] http://www.jsonline.com/news/education/diminished-in-wake-of-act-10-2-teachers-unions-explore-merger-b99174118z1-239150441.html.

[16] http://lacrossetribune.com/news/local/after-act-weac-down-to-half-strength/article6ad3c08f-b65a-5d35-aedf-0483024d1355.html.

did not disclose any LM-2s for WEAC during this period.[17]

The American Federation of State, County and Municipal Employees Council 40, which represented county and municipal employees in Wisconsin, did file LM-2s. From 2010 to 2015, Council 40 logged the following six annual membership numbers: 32,310; 31,730; 29,777; 20,488; 13,256; and 9,568, in chronological order.[18] Over that same time period, AFSCME Council 48, which covered Milwaukee public employees, recorded the following six membership numbers: 8,183; 9,043; 6,046; 3,498; 3,405; and 2,784, also in chronological order.[19] In May 2015, it was announced that Council 40 and Council 48 were merging with AFSCME Council 24, which had covered state government employees, to form AFSCME Council 32.[20]

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[17] The LM-2 is an annual financial report that labor organizations are required to file with the U.S. Office of Labor Management Standards. See generally, 29 C.F.R. § 403.2.

[18] LM-2s can be found at http://www.dol.gov/olms/regs/compliance/rrlo/lmrda.htm. On that page, click on "union search." The Council 40 file number is "509-685." The next page that appears will be a "Result Set" page with Council 40's 2014 LM-2. Clicking on "STATE COUNTY & MUNI EMPLS AFL-CIO LEADERSHIP COUNCIL 40" will bring up Council 40's LM-2s from 2000 to 2015.

[19] Council 48's DOL file number is 517-464.

[20] http://host.madison.com/news/local/govt-and-politics/with-dues-depleted-wisconsin-s-three-afscme-councils-merge/article_136e2e6e-c63a-503b-8aa5-ad4586ba9e1d.html. Council 24 did not file any LM-2s.

Wisconsin's statewide public-sector union membership has shown some decline as well. Wisconsin's total membership in state and local government employee unions appear in the table below.[21]

State and Local Gov't Employee Union Members in Wisconsin

Year	Members Statewide
2000	164,221
2001	157,120
2002	157,460
2003	173,779
2004	166,984
2005	150,587
2006	164,088
2007	177,714
2008	162,021
2009	185,826
2010	157,674
2011	170,370

[21] Simple two-column tables are presented directly in the text of the brief. Tables that are larger or more complex are presented on fold-out pages in the Appendix for typesetting reasons.

2012	128,497
2013	122,605
2014	111,492

http://www.mackinac.org/archives/2015/Friedrichs%20Crosstabs.pdf.

From 2011 to 2014, then, Wisconsin's public-sector unions lost 58,878 members. It is not clear that right-to-work is responsible for this decline. Other factors could be in play. These factors may include Act 10's limitation of bargaining to wages only (with a cap based on the consumer price index that can only be overcome by a referendum),[22] Act 10's requirement that a union demonstrate member support through an annual recertification election, and changes in the state budget.[23]

Even with Wisconsin's overall drop in public-sector union membership, its membership rate among state and local government workers covered by collective

[22] As discussed in more detail under "3. States with broad public-sector exclusive-bargaining statutes and prohibitions on agency fees," a narrow scope of bargaining may reduce worker interest in union membership.

[23] For instance, according to the Wisconsin Legislative Fiscal Bureau's latest "Informational Papers," state aid to school districts declined 8.1 percent from fiscal 2010-2011 to fiscal 2011-2012, falling from $5.3250 billion to $4.8935 billion. See Table 3 (page 4) of http://legis.wisconsin.gov/lfb/publications/InformationalPapers/Documents/2015/24_State%20Aid%20to%20School%20Districts.pdf.

bargaining agreements has remained over 90%, as shown in the table below.

Union Membership Rates Among State and Local Gov't Employees Covered by CBAs in Wisconsin

Year	Union Membership Rate
2000	93.7%
2001	93.5%
2002	95.6%
2003	95.9%
2004	93.9%
2005	92.1%
2006	92.6%
2007	94.6%
2008	96.6%
2009	96.3%
2010	94.7%
2011	94.3%
2012	92.7%
2013	95.3%
2014	91.4%

http://www.mackinac.org/archives/2015/Friedrichs%20Crosstabs.pdf.

Given the findings in amicus curiae's prior and instant briefs, one could expect right-to-work to modestly reduce this membership percentage in the near future. The events in Wisconsin, however, do not support the theory that a state's interest in exclusive representation requires agency fees. Whatever the decline in Wisconsin's public-sector union membership in recent years, right-to-work has not been shown to be the cause.

2. Michigan

In its brief at the certiorari stage, amicus curiae tested the dissent's economic theory by looking at the post-right-to-work experience of the Michigan Education Association (MEA), Michigan's largest (predominately) public-sector union.[24] Key elements of that analysis are discussed below. New union membership figures for state and local government workers in Michigan are then presented.

Michigan's public-sector right-to-work law passed on December 12, 2012, and it took effect on March 28, 2013. 2012 Mich. Pub. Act 349. The law "grandfathered" in all public-sector collective bargaining agreements that were then in force and that included a requirement for agency fees. Mich. Comp. Laws § 423.210(5). This grandfathering, which was to last

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[24] This discussion of the MEA appeared on pages 10-19 of amicus curiae's brief in favor of certiorari.

only for the duration of the contract, included many public school bargaining agreements.

This exemption, then, provides context for the MEA's membership numbers following the passage of right-to-work. Another important piece of context is the MEA's approach to membership. The MEA has taken the position that two events must occur before an individual can be excused from paying membership dues: (1) there is no longer an enforceable agency-fee clause in a collective bargaining agreement and (2) the individual must resign from the union.[25]

Further, the MEA recognizes only those resignations that occur in August.[26] This requirement is commonly referred to as the "August window."[27] In

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[25] The MEA contends that employees who signed a "Continuing Membership Application" – a dues check-off form – have entered into a separate contractual relationship that requires them to continue paying membership dues. The MEA's position mirrors that taken by some private-sector unions. The NLRB, while recognizing this Court's holding that employees have the right to resign at any time, *Pattern Makers' League of North America, AFL-CIO v. NLRB*, 473 U.S. 95 (1985), has held that if an employee signs a dues checkoff with "clear and unmistakable language waiving the right to refrain from assisting a union" the union may continue to demand membership dues. *Int'l Bhd. of Elec. Workers, Local No. 2088 AFL-CIO (Lockheed Space Operations Co. Inc.)*, 302 NLRB 322 (1991).

[26] http://www.mea.org/sites/default/files/images/governance/Bylaws.pdf (Bylaw I).

[27] This window has been declared illegal by an administrative law judge at the Michigan Employment Relations Commission (MERC). *In re Saginaw Educ. Ass'n (Eady-Miskiewicz et al.)*, Case No. CU13 1-054 (September 2, 2014) (copy can be

(Continued on following page)

October 2013, the MEA announced that only 1% of its membership had left the union in August 2013.[28] Around this time, MEA President Steven Cook provided lengthy quotes indicating that this result showed that the MEA was strong and that right-to-work was not going to end the union.[29] A few months later, the MEA admitted that 1,500 members had left the union – actually more than 1% of the membership.[30]

Regardless, the MEA's retention performance may have been bolstered by its failure to inform its membership of the August window in advance. By August 2014, however, the MEA's membership was more aware of the significance of the August window. Amicus curiae, among others, engaged in a sustained informational campaign about it. Also, under Mich.

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found at https://goo.gl/9elYUL). A different administrative law judge has held that MERC lacks jurisdiction over the legality of the window. *Teamsters Local 214 (Beutler)*, Case No. CU13 I-037 (October 3, 2014), http://www.mackinac.org/archives/2015/MERC decision.pdf. Both cases have been appealed to the full commission.

[28] https://web.archive.org/web/20150315112656/http:/www.mea.org/99-members-remain-mea-much-chagrin-opponents-public-education. The initial web address used in amicus curiae's certiorari-stage brief, http://www.mea.org/99-members-remain-mea-much-chagrin-opponents-public-education, is no longer active.

[29] Further, in one interview, Cook related that he had discussed right-to-work with then United Auto Workers (UAW) President Bob King, who had told Cook that the UAW retains 94-95% of its membership in right-to-work states.

[30] http://www.mea.org/mea-responds-mackinac-center-lawsuit.

Comp. Laws § 423.210(5), more school districts were eligible. In addition, some confusion about another dues-related law had abated.[31]

In September 2014, the MEA announced that "more than 95 percent of our members stayed. [In August 2014], less than 5,000 members left the MEA out of about 110,000 active members."[32] A third MEA official, Nancy Knight, director of communications and public policy, indicated that the union believed that the union's membership had stabilized.[33]

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[31] This law, 2012 Mich. Pub. Act 53, codified at Mich. Comp. Laws § 423.210(1)(b), prohibits school districts from collecting dues and fees from school employees' paychecks. Many workers had assumed that by not signing up for the MEA's alternative dues-payment plan, they were exercising their choice under the state's right-to-work law to end their financial support of the union. Later litigation over the MEA's August window showed that thousands of individuals looking to resign membership may have been confused in this way. *In re Saginaw Education Association (Eady-Miskiewicz et al.)*, Case No. CU13 1-054 (September 2, 2014) at 12. As early as June 2014, the MEA reportedly sent the names of many of these individuals to collection agencies. http://www.mlive.com/lansing-news/index.ssf/2014/06/tim_skubick.html.

[32] http://www.mea.org/mea-statement-august-window-merc-rulings.

[33] http://www.freep.com/story/money/business/columnists/2015/01/23/union-membership-michigan-right-workfall-state/22219305/.

As of this writing, the MEA has not announced how many members may have left the union in August 2015.[34]

Amicus curiae reviewed the MEA's LM-2 forms from the years 2005 to 2014 to determine the effect of right-to-work and assess the union's public statements about its losses.[35] Appendix, Table A. Table A shows the change in MEA membership and income in dues and fees during that period. The union's membership, at roughly 108,000 in 2014, was down around 10,000 members between 2012 and 2014 – a decline of 8.0%. This is somewhat more than the 6,500 members – 1,500 in 2013, and 5,000 in 2014 – that the union publicly announced as its net losses during that period due to the right-to-work law. The 3,500-member difference, however, may be attributable to a long-term decline in the MEA's membership independent of the effects of right-to-work. Two major

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[34] A local union official claimed that around April 2015, he had been told some numbers by the MEA's Treasurer, http://www.portageea.org/uncategorized/responsive-union-now-more-than-ever-heres-why/ but these numbers seem to conflict with the MEA's 2014 LM-2. http://www.michigancapitolconfidential.com/21651.

[35] Underreporting on an LM-2 is unlikely, since the Labor-Management Reporting and Disclosure Act of 1959 criminalizes false data on the form. 29 U.S.C. § 439.

A local union official claimed that around April 2015, he had been told some interim membership numbers by the MEA's treasurer, http://www.portageea.org/uncategorized/responsive-union-now-more-than-ever-heres-why/, but official's numbers seem to conflict with the MEA's 2014 LM-2. http://www.michigancapitol confidential.com/21651.

factors in this decline are the steady drop in the number of Michigan children attending public schools since 2004[36] and the increase in the number of districts privatizing the provision of major school support services.[37]

The MEA's membership data, though scant and affected by a variety of factors since the passage of Michigan right-to-work law, do not support the *Harris* dissenters' argument. Indeed, the MEA's leadership does not appear to share the *Harris* dissenters' view of the union's "disability" under the dual requirements of exclusive representation and fair representation. In 2013, Doug Pratt, the MEA's director of member and political engagement, was asked during a Michigan Senate hearing the hypothetical question of whether the MEA would like to be relieved of the duty of representing those who opted out of the union. Pratt indicated the MEA would prefer to retain exclusive representation.[38] Thus, to at least one large

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[36] http://www.senate.michigan.gov/sfa/Departments/DataCharts/DCk12_PupilHistory.pdf.

[37] http://www.mackinac.org/archives/2014/S2014-05.pdf at 3 (In Michigan, "contracting out increased from 31.0 percent of school districts in 2001 to 66.6 percent of school districts in 2014.").

[38] https://www.youtube.com/watch?v=OHhTPkoZdU&feature=youtu.be. A transcription of these remarks are set out in amicus curiae's certiorari-stage brief.

Perhaps in the future, this option will be less hypothetical. Amicus curiae has developed "Workers Choice" legislation that would end the union's duty of fair representation by limiting the

(Continued on following page)

union, the benefit of exclusive representation is greater than the "disability" of the duty of fair representation. Indeed, Pratt did not characterize fair representation as a disability, but rather as "a responsibility to anybody who is employed within a bargaining unit that we represent to represent them in good faith. . . ."[39]

Inevitably, the figures for Michigan's public-sector union membership since the passage of the state's right-to-work law cannot provide much additional data, since the law only took effect in 2013. Michigan's state and local public-sector union membership numbers are provided in the table below. Note that Michigan's state and local government employee unions lost 73,294 members between their recent high in 2005 and 2010. Nearly 45,000 of those members were lost in one year alone, between 2009 and 2010. That one-year decline eclipses the 28,951 members lost between 2013, when right-to-work took effect, and 2014, the latest year for which data are available.

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union to the representation of its members only. https://www.mackinac.org/archives/2015/s2015-03.pdf.

[39] https://www.youtube.com/watch?v=OHhTPkoZdU&feature=youtu.be.

State and Local Gov't Employee Union Members in Michigan	
Year	**Members Statewide**
2000	288,642
2001	312,847
2002	297,433
2003	295,051
2004	307,389
2005	311,831
2006	298,450
2007	283,432
2008	278,869
2009	283,180
2010	238,537
2011	249,989
2012	231,453
2013	228,011
2014	199,060

http://www.mackinac.org/archives/2015/Friedrichs%20Crosstabs.pdf.

As in Wisconsin, it is not known how much of the change since the state's right-to-work law took effect is due to that law and how much is due other factors. Further complicating the picture is the fact that the state's right-to-work law, as noted above, grandfathered

in any collective bargaining agreements that contained agency-fee clauses before the law became effective. Mich. Comp. Laws § 423.210(5). Hence, the full impact of the right-to-work law has yet to be felt, and isolating its impact is difficult.

Regardless, as shown in the table below, the scant post-right-to-work evidence does not support the view that the existence of a right-to-work law has caused a precipitous increase in so-called "free riders" and a decline in union membership among state and local government employees covered by a collective bargaining agreement.

Union Membership Rates Among State and Local Gov't Employees Covered by CBAs in Michigan

Year	Union Membership Rate
2000	95.6%
2001	96.7%
2002	96.5%
2003	96.9%
2004	97.1%
2005	98.1%
2006	96.6%
2007	94.5%

2008	98.4%
2009	95.9%
2010	95.0%
2011	94.9%
2012	98.2%
2013	97.1%
2014	95.7%

http://www.mackinac.org/archives/2015/Friedrichs%20Crosstabs.pdf.

Over time, these figures will probably decrease modestly in a right-to-work environment. But there is nothing to indicate that these numbers will not reach a functional equilibrium similar to that reached with the private-sector workers in right-to-work states. Appendix, Table B.

The Michigan material shows that high-ranking MEA officials believe that even absent an agency-fee clause – or a "fair-share agreement," as the *Harris* dissenters labeled it – the union can still attract sufficient dues to adequately support its functions and remain a viable counterpart at the bargaining table. And while the limited post-right-to-work data prevents a meaningful conclusion about the law's impact, it clearly does not suggest that right-to-work caused a precipitous decline in support for public-sector unions among state and local government employees covered by a collective bargaining agreement.

3. States with broad public-sector bargaining statutes and prohibitions on agency fees.

It is reasonable to assume that union membership will drop in states that, like Wisconsin and Michigan, have just recently passed right-to-work laws. Workers who previously wanted to withhold financial support from the union are now free to do so. But after these initial departures, the evidence suggests, union membership will stabilize.

As indicated above, amicus curiae has now extended its earlier private-sector analysis, presented at the certiorari stage, to the public sector. This public-sector analysis, like the private-sector analysis, attempts to determine the need for agency fees in the environment described by the *Harris* dissenters – i.e., collective bargaining in which unions are granted the power of exclusive representation under a requirement of fair representation.

In the public sector, however, a new factor arises. Unlike the extensive and uniform scope of private-sector collective bargaining, which is governed nationwide primarily by the National Labor Relations Act,[40] the scope of public-sector collective bargaining can vary considerably. The federal government and state governments each regulate the scope of bargaining

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[40] See, e.g., *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979) (holding price of candy in vending machines was mandatory subject of bargaining).

for their own employees. In public-sector bargaining at the federal level, for example, wages are generally not a subject of bargaining,[41] and bargaining over the terms and conditions of employment is curtailed.[42]

This is a potentially important concern. Recall the *Harris* dissenters' observation that only 1/3 of "full-time federal wage system (blue-collar) and General Schedule (white collar) employees who are represented by a collective bargaining contract . . . belong to the union and pay dues." They suggest that the lack of an agency fee leads to this low level of union membership because it creates an incentive to "free ride."

It is quite possible, however, that this low level of support is due to the narrow scope of bargaining permitted at the federal level. Employees may feel little motivation to support an organization that cannot impact their wages and that has limited input into other aspects of their employment. Indeed, the decline in union membership rates in Wisconsin following the passage of Act 10 of 2011 – an act that limited collective bargaining to wages, and even

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[41] See generally, 5 U.S.C. § 5332 (General Schedule).

[42] For federal employees, the "terms and conditions of employment" subject to collective bargaining are narrower than they are, for instance, for private-sector employees under the National Labor Relations Act. Compare 5 U.S.C. § 7103(a)(14) (exempting certain terms and conditions of employment from mandatory bargaining) with 29 U.S.C. § 158(d) (no limit on terms and conditions that require mandatory bargaining).

subjected those wages to a statutory cap – indicates that a narrow scope of collective bargaining could affect union membership rates.

Thus, amicus curiae removed federal employees from its analysis of collective bargaining in the public sector. It then focused on states that mandated not only exclusive representation, fair representation, and an absence of agency fees (right-to-work), but a broad scope of collective bargaining. To ensure the analysis wasn't skewed by a small sample of employees, a further requirement that a state extend collective bargaining to a significant number of government employees – not just, say, firefighters – was added. In addition, any state that significantly altered any of these policies during the period from 2000 to 2014 was excluded, since it was the equivalent of the "mixed-states" treated separately in amicus curiae's private-sector analysis. Thus, Michigan and Wisconsin, for instance, were excluded.

Ultimately, eight states met these requirements: (1) Florida;[43] (2) Idaho;[44] (3) Iowa;[45] (4) Kansas;[46] (5) Nebraska;[47] (6) Nevada;[48] (7) North Dakota;[49] and

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[43] Florida provides for mandatory collective bargaining. Fla. Stat. §§ 447-201 to 447-609. Florida's Constitution contains a right-to-work clause. Fla. Const. art. I, § 6.

[44] Idaho allows teachers to enter into exclusive bargaining relationships with the school districts. Idaho Code §§ 33-1271 to 33-1276. It also allows firefighters to engage in exclusive bargaining. *Id.* at §§ 44-1801 to 44-1812. Idaho's right-to-work provisions, *id.* at §§ 44-2001 to 44-2014, are "applicable to all employment, private and public, including all employees of the state and its political subdivisions." *Id.* at § 44-2011.

[45] Iowa allows mandatory public-sector bargaining. Iowa Code §§ 20.1 to 20.31. Iowa has a right-to-work statute for its public-sector employees. Iowa Code § 20.8(4).

[46] Kansas allows public employees to be represented by public-sector unions in bargaining with public agencies. Kan. Stat. §§ 75-4321 to 75-4337. It has a separate statutory scheme allowing teachers to be represented by an exclusive bargaining representative. Kan. Stat. §§ 72-5410 to 72-5437. Kansas has a right-to-work clause in its Constitution. Kan. Const. art. XV, § 12.

[47] Nebraska allows state employees to engage in exclusive collective bargaining. Neb. Rev. Stat. §§ 81-1369 to 81-1388. Other public employees also have the ability to engage in exclusive bargaining. Neb. Rev. Stat. §§ 48-801 to 48-842. The Nebraska Constitution has three provisions related to right-to-work. Neb. Const. art. XV, §§ 13-15.

[48] Nevada allows local government employees to engage in exclusive bargaining. Nev. Rev. Stat. §§ 288.010 to 288.280. Right-to-work applies to these employees. Nev. Rev. Stat. § 288.140.

[49] North Dakota allows public employees to engage in exclusive bargaining. N.D. Cent. Code §§ 34-11.1-01 to 34-11.1-08. Public employees cannot be forced to pay agency fees. N.D.

(Continued on following page)

(8) South Dakota.[50] The CPS data for state and local government workers in these eight states yield figures very similar to those for private-sector employees in right-to-work states. The union membership rate among workers covered by public-sector collective bargaining agreements ranges in percentage from the mid-70s to the low 80s. Indeed, when the union membership rates for state and local government employees in the eight states are overlaid on the graph of private-sector rates, the results are striking. Appendix, Table D; note that Table D is simply Table B with an additional new line,[51] in purple, for the eight states' aggregate union membership rates among state and local government employees covered by collective bargaining agreements.[52] It

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Cent. Code § 34-11.1-03. North Dakota also has a statute on public school teacher bargaining. N.D. Cent. Code §§ 15.1-16-01 to 15.1-16-22. Here too, right-to-work applies. N.D. Cent. Code § 15.1-16-07(3).

[50] South Dakota allows exclusive public-sector bargaining. S.D. Codified Laws §§ 3-18-1 to 3-18-17. Right-to-work applies. S.D. Codified Laws § 3-18-2. The South Dakota Constitution also has a right-to-work clause. S.D. Const. art. VI, § 2.

[51] Although the top three lines in Table B and Table D represent identical data, the tables were generated using different software tools. As a result, very small variations between the two charts are visible on close inspection. In general, the lines in Table B are a bit thicker and less precise than those in Table D.

[52] These membership rates were calculated by dividing the aggregate number of state and local public-sector union members in the eight states by the aggregate number of state and local employees covered by a collective bargaining agreement in

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shows that these union membership rates are quite similar to those seen for private-sector workers covered by collective bargaining agreements in right-to-work states.

The table below shows the year-to-year union membership percentages for state and local government employees covered by collective bargaining agreements. The membership rates prior to 2008 ranged between 73.4% and 78.0%; from 2008 onward, they are 80% or higher.

Union Membership Rates Among State and Local Gov't Employees Covered by CBAs in the Eight Public-Sector Right-to-Work States with Broad Collective Bargaining

Year	Union Membership Rate
2000	75.8%
2001	76.6%
2002	75.6%
2003	73.4%
2004	76.0%

the eight states. It is of course possible to analyze each states' figures separately and combined them unweighted. The results do not differ significantly, however, if this latter method is used. The state by state computations are available at http://www.mackinac.org/archives/2015/Friedrichs%20Crosstabs.pdf.

2005	75.8%
2006	78.0%
2007	77.8%
2008	80.1%
2009	82.8%
2010	81.5%
2011	80.5%
2012	81.0%
2013	81.7%
2014	81.0%

http://www.mackinac.org/archives/2015/Friedrichs%20Crosstabs.pdf.

Table E of the Appendix also shows figures for state and local government in the eight states over that period – both the number of workers who were union members and the number who were covered by collective bargaining agreements. The table suggests a moderate ebb and flow, with both sets of numbers moving roughly in unison. No steady decline in either figure is evident, again casting doubt on the *Harris* dissenters' hypothesis.

In fact, the similarity in union membership rates between the public-sector analysis and the private-sector analysis suggests that not only that agency fees are unnecessary for viable exclusive bargaining, but that the narrow scope of collective bargaining is a likely reason that union membership rates among federal employees are low.

Abood was decided in 1977. It is understandable that in 1977, this Court was forced to make its best guess about what would happen to unions without agency fees. Now there is ample data available, however. Included in that information is what happens to state and local public-sector unions in a right-to-work environment.

This Court need not engage in conjecture about what will happen if First Amendment concerns lead it to prohibit agency fees for public-sector workers. Tables B and D show that union membership rates hover around 80% in right-to-work environments. Tables C and E, meanwhile, show that union membership and coverage retains significant magnitude. The absence of a decline undermines the *Harris* dissenters' theory that the duty of fair representation and "endemic free-riding" will inevitably undermine the state interest in viable exclusive representation.

CONCLUSION

For the reasons stated above, this Court should overrule *Abood* and hold that agency-fee requirements for state and local government employees covered by a collective bargaining agreement are unconstitutional.

Respectfully submitted,

PATRICK J. WRIGHT
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Mackinac Center for Public Policy

APPENDIX

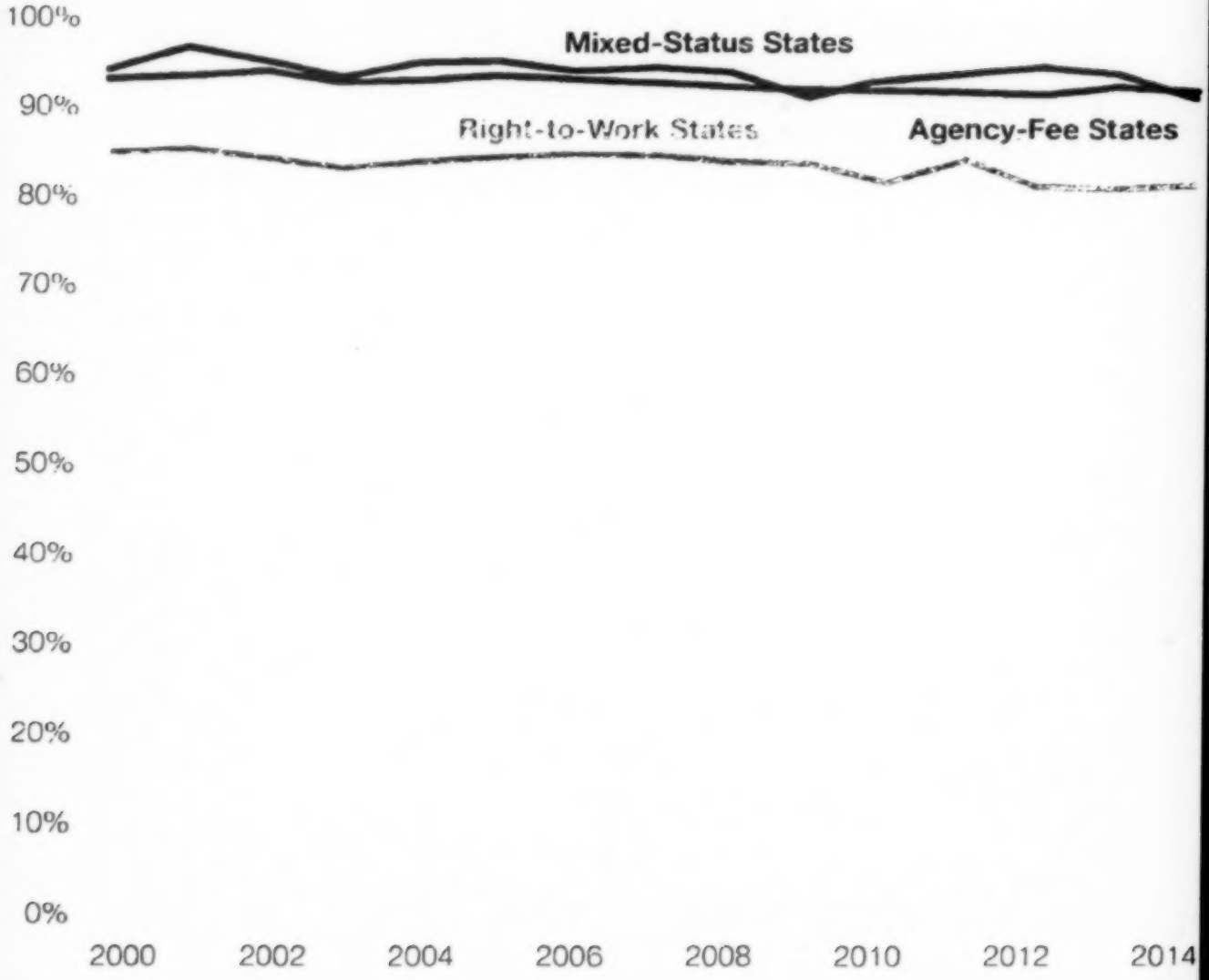
In Table A, the "Teacher Members," "Support Staff Members" and "Fee Payers" data are from Schedule 13 of the LM-2; the MEA uses the EA designation for teachers and the ESP designation for support staff, such as custodians, secretaries, cafeteria workers, and bus drivers. The "Fee Payers" are bargaining unit employees who have chosen fee-payer status. Finally, the "Dues/fees collected" column is from Statement B, line 36, of the LM-2.

TABLE A

The Michigan Education Association: Members, Fee Payers, and Related Income, Fiscal Years 2005-2014					
Year	Teacher Members	Support Staff Members	Total Teacher and Support Staff Members	Fee Payers	Dues/Fees Collected
2014	78,924	28,944	107,868	483	$56,691,409
2013	81,571	31,576	113,147	582	$64,381,493
2012	84,031	33,234	117,265	606	$61,895,814
2011	86,135	34,210	120,345	587	$62,794,268
2010	89,599	36,462	126,061	669	$65,533,634
2009	90,835	36,744	127,579	624	$66,322,937
2008	89,236	37,018	126,254	628	$66,574,547
2007	89,272	37,131	126,403	734	$66,655,566
2006	90,792	37,130	127,922	685	$63,280,429
2005	92,207	38,675	130,882	683	$64,292,138

TABLE B

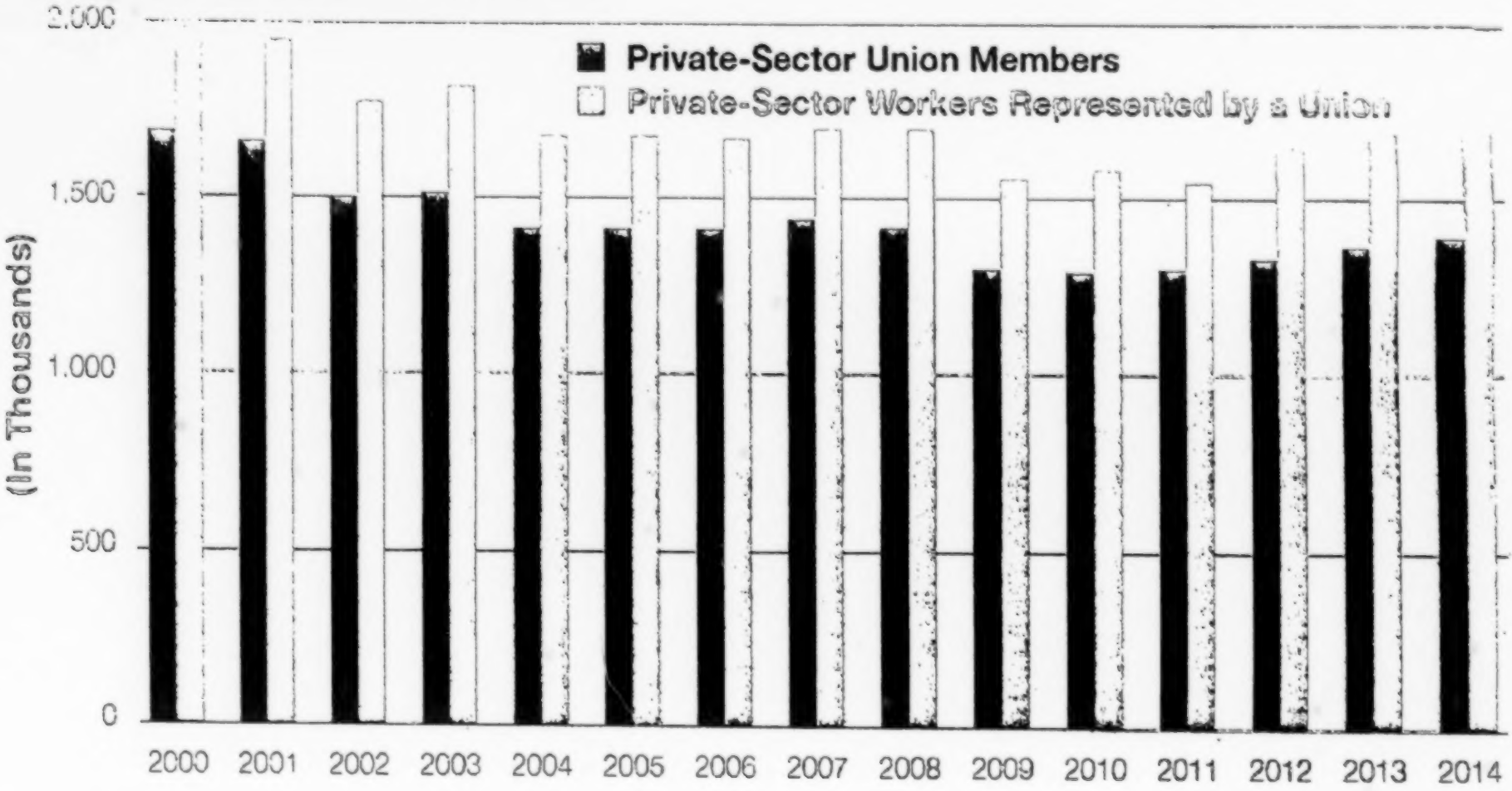
ercentage of Union Members Among rivate-Sector Workers Represented by Union in Right-to-Work, Agency-Fee, nd Mixed-Status States,* 2000-2014



The mixed-status states are Michigan, Indiana, and Oklahoma, each of which became a ri o-work state between 2000 and 2014.

urce: Calculations based on data m Unionstats.com.

Private-Sector Union Members and Represented Workers in Right-to-Work States, 2000-2014



Source: Calculations based on data from Unionstats.com

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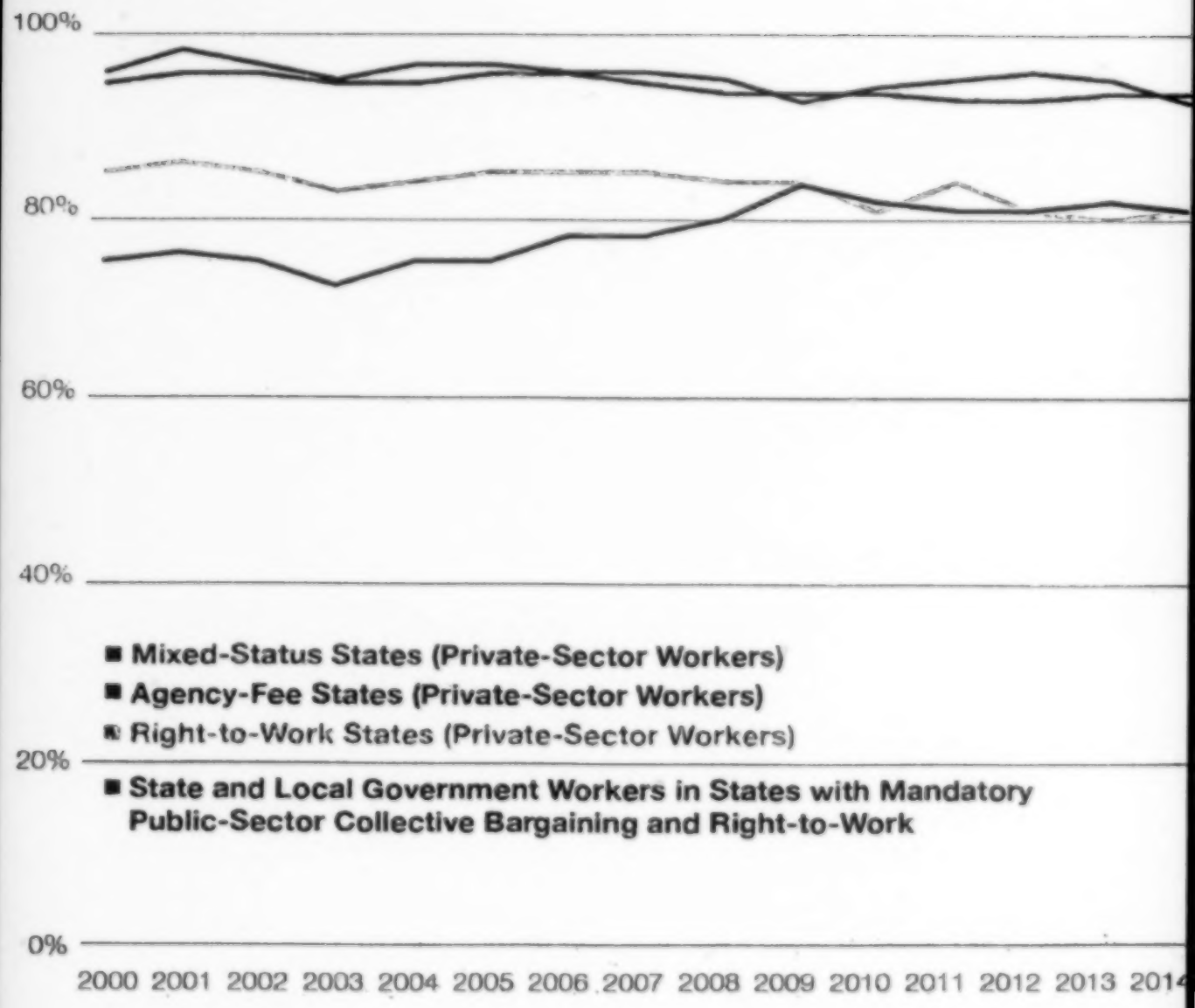
TABLE D

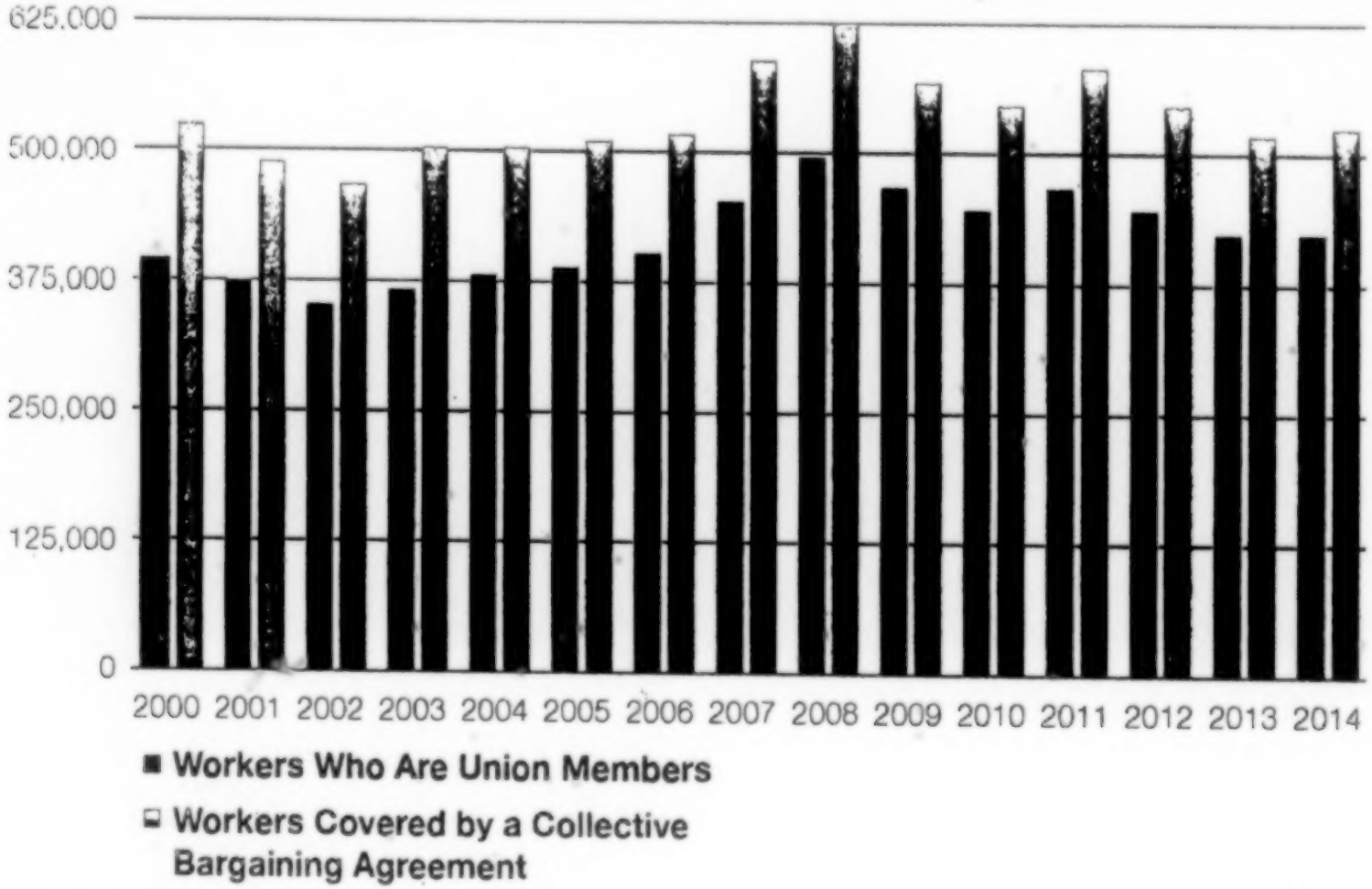
ercentage of Union Members Among hose Covered by Collective argaining Agreements, 2000-2014


100%
80%
60%
40%
20%
0%
Mixed-Status States (Private-Sector Workers)
Agency-Fee States (Private-Sector Workers)
Right-to-Work States (Private-Sector Workers)
State and Local Government Workers in States with Mandatory Public-Sector Collective Bargaining and Right-to-Work
2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014

The mixed-status states are Michigan, Indiana, and Oklahoma, each of which became a rig o-work state between 2000 and 2014.

urce: Calculations based on data m Unionstats.com and the Bureau of bor Statistics' Current Population Survey.

Union Membership Among State and Local Government Workers Covered by Collective Bargaining Agreements in States with Broad Public-Sector Collective Bargaining and Right-to-Work



Source: Calculations based on data from the Bureau of Labor Statistics' Current Population Survey.

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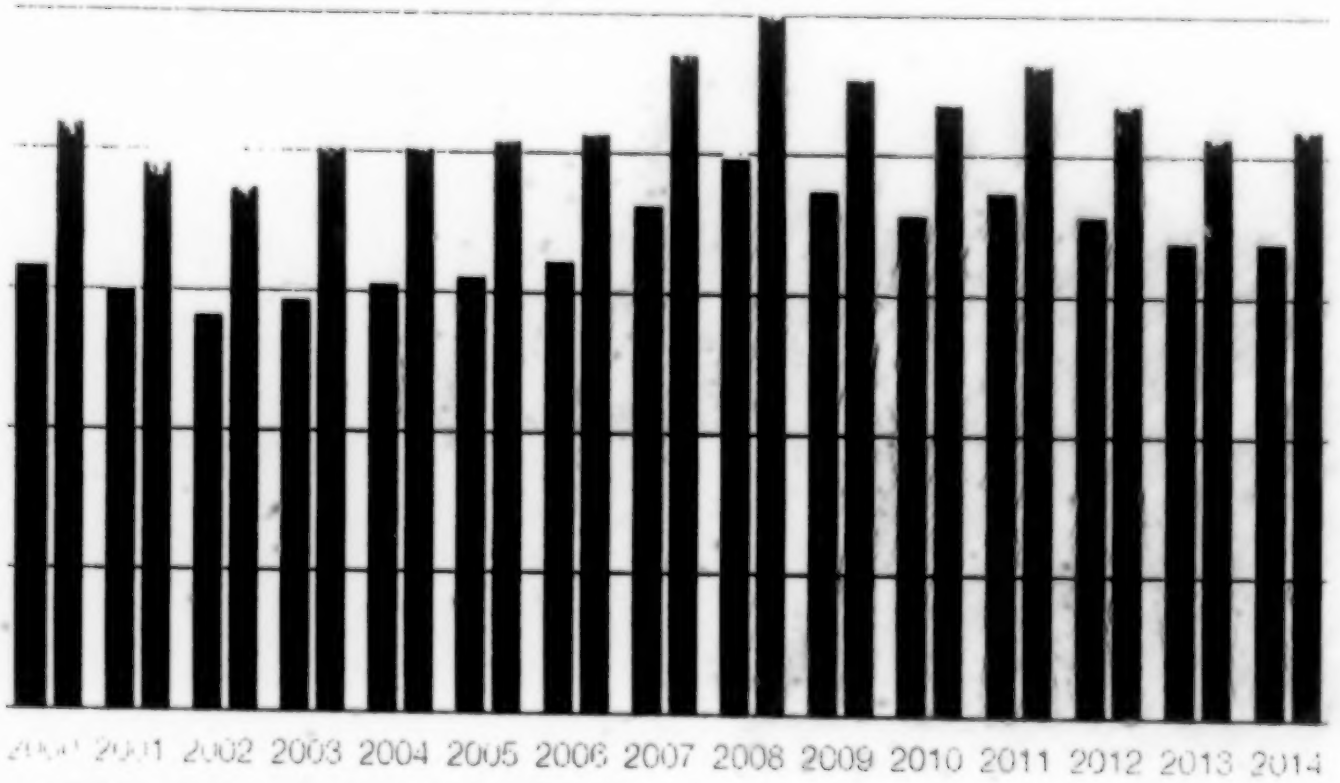
Union Membership Among State and Local Government Workers Covered by Collective Bargaining Agreements in States with Broad Public-Sector Collective Bargaining and Right-to-Work


2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014
Workers Who Are Union Members
Workers Covered by a Collective Bargaining Agreement

Source: Calculations based on data from the Bureau of Labor Statistics' Current Population Survey.